No. 90-1676

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

MARY GADE, Director of the Illinois Environmental Protection Agency,

Petitioner,

against

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, NEW JERSEY AND OHIO AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Interest of *Amici Curiae*

This brief is filed on behalf of nine states as *amici curiae*, pursuant to Rules 37.1 and 37.5 of the Supreme Court Rules, in support of the brief filed by petitioner Mary Gade, Director of the Illinois Environmental Protection Agency.

The issues raised on this appeal are of importance to all states, including New York and the eight other amici curiae joining in this brief. The Court of Appeals for the Seventh Circuit held in this case that the U.S. Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. § 655 *et seq.*, preempts a state from enforcing a licensing law which serves a dual purpose, *i.e.*, safety of workers and protection of the environment and the public welfare.

The states have a vital interest in protecting their environment, the health of their residents and the safety of their natural resources. The police power of the states has historically included the right to regulate and license trades and professions which affect these areas of interest. More recently, with the discovery of the harmful health effects which hazardous substances have upon the public and the environment, states have taken an active role in regulating new occupations and activities in the burgeoning field of environmental protection, such as pesticide applicators, asbestos handlers and, as in this case, hazardous waste site workers. Preemption of these state licensing and permit laws by the OSH Act would adversely affect states' efforts to ensure adequate protection of the environment and the health and welfare of their residents.

Summary of Argument

The state laws in issue in this case, the Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Rev. Stat. ch. 111, ¶ 7701 *et seq.* ("the Operators Act") and the Illinois Hazardous Waste Laborers Leasing Act, Ill. Rev. Stat. ch. lll, ¶ 7801 *et seq.* (the "Laborers Act") (collectively referred hereafter to as "Illinois' hazardous waste licensing requirements"), have as a substantial and legitimate purpose the protection of the environment and the safeguarding of the public welfare. A state such as Illinois should be able to exercise its traditional police power to license and regulate occupations and professions affecting these areas of significant state interest unless Congress has expressly or impliedly preempted them from doing so. Here, the OSH Act expressly preempts the states only from asserting jurisdiction over occupational safety and health standards. Since the Illinois laws are not occupational safety and health standards, they are not expressly preempted by the OSH Act. Although the Illinois laws implicate the occupational safety and health of employees in the workplace, the OSH Act does not reflect any clear and manifest intent of Congress to expressly preempt state laws which have a dual purpose. Moreover, since the Illinois' hazardous waste licensing requirements do not actually conflict with the requirements of the Occupational Safety and Healthy Administration's ("OSHA") Hazardous Waste Operations and Emergency Response standard, 29 C.F.R. § 1910.120 (1989) (the "hazardous waste standard"), and the hazardous waste standard is limited in scope to protecting hazardous waste workers and not the general public, the OSH Act does not impliedly preempt Illinois' hazardous waste licensing requirements. Accordingly, the judgment of the United States Court of Appeals for the Seventh Circuit, which ruled that Illinois' Operators and Laborers Acts are preempted by the OSH Act, should be reversed.

ARGUMENT

THE OSH ACT DOES NOT PREEMPT STATE LICENSING LAWS WHICH HAVE THE DUAL PURPOSE OF SAFEGUARDING THE ENVIRONMENT AND THE PUBLIC WELFARE AND ENSURING WORKER HEALTH AND SAFETY

States, in the traditional exercise of their police powers, have imposed licensing requirements on occupations engaged in activities affecting the public health, as well as the environment. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, *reh'g denied*, 423 U.S. 886 (1975). In *Goldfarb*, the Court declared that "States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Id.* at 792. With the discovery of the harmful health effects which hazardous substances have upon the public, the environment and natural resources, states have begun to regulate the work of new occupations and professions, such as the removal of asbestos from buildings and application of pesticides, which involve risks to the public welfare and the environment.[1]

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[1] To safeguard the environment and the public welfare, states have established minimum training requirements, safe work practices and licensing requirements for professions engaged in work involving the potential exposure of hazardous and toxic substances to the environment. *See Associated Indus. of Mass. v. Snow*, 898 F.2d 274 (1st Cir. 1990)(state law establishing system for training, licensure and certification of individuals involved in asbestos abatement work); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir. 1988)(municipal regulations requiring training and certification of asbestos abatement workers); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), *appeal after remand*, 868 F.2d 621 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989); and *Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987)(training, chemical (continued...)

Illinois' hazardous waste licensing requirements represent a traditional exercise of the State's police power to regulate professions which affect these areas of state interest. Work on hazardous waste sites presents dangers to the surrounding community, the environment and hazardous waste workers. The public welfare is threatened by inadequate and unsafe work practices on hazardous waste sites, such as the failure to properly decontaminate workers and equipment and the failure to safely secure hazardous waste shipments. Illinois' hazardous waste licensing requirements address these risks by imposing testing and experience requirements on laborers and persons operating cranes and hoists capable of lifting more than two tons at hazardous waste sites.

Such an exercise of the traditional police powers of the states is not preempted by federal laws unless it is "the clear and manifest intent of Congress" to do so. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978)(citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1960)). Congress may manifest its intent to preempt state or local authority in a given area by expressly stating that intention. *Wisconsin Public Intervenors v. Mortier*, 111 S. Ct. 2426, 2481 (1991); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). Where Congress has not expressly preempted state regulation in a specific area, a state law may be impliedly preempted if Congress has occupied the field or if the state law actually conflicts with federal law. *Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 204 (1983). Here, the OSH Act has neither expressly nor impliedly preempted the states from enforcing laws which have the dual purpose of

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[1](...continued)
inventory and labelling requirements in state worker and community right to know laws). The employment-related requirements in these state and local laws, in many cases, are inextricably intertwined and necessary to the effectuation of their overriding purpose to protect the public welfare.

safeguarding the environment and the public welfare, and protecting workers' health and safety.

A. The OSH Act Does Not Expressly Preempt State Licensing Laws Which Protect The Public Welfare And The Environment, Even Though Such Laws May Also Affect The Occupational Health And Safety Of Hazardous Waste Workers

In applying the preemption principles laid down by this Court, the Seventh Circuit concluded that the OSH Act expressly preempts state licensing laws which have a dual purpose of protecting the public welfare and the environment, as well as protecting workers. The court held that the Illinois' hazardous waste licensing requirements are preempted by the OSH Act because their effect on employer-employee obligations with respect to worker safety cannot be separated from the regulations' public health and environmental concerns. *National Solid Wastes Management Association v. Killian*, 918 F.2d 671, 684 (7th Cir. 1990). This conclusion was erroneous.

The OSH Act expressly preempts only those laws which assert jurisdiction over occupational safety and health issues with respect to which a federal standard is in effect.[2] *See*

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[2] The courts have consistently recognized that a state may address worker safety and health issues for which no federal standards are in effect. *See West Virginia Manufacturers Association v. State of West Virginia*, 714 F.2d 308, 313-314 (4th Cir. 1983)(West Virginia statute requiring employers to disclose to employees hazardous substances not preempted); *Berardi v. Getty Refining & Marketing Co.*, 107 Misc.2d 451, 435 N.Y.S.2d 212 (Richmond Co. 1980)(New York State statute obligating contractors to provide safety devices or equipment during construction not preempted); *Shimp v. New Jersey Bell Telephone*, 145 N.J. Super. 516, 368 A.2d 408 (1976)(OSH Act does not preempt state enforcement of state of New Jersey common law duty (continued...)

section 18(a) of the OSH Act, 29 U.S.C. § 667(a). No federal standard is in effect with respect to the protection of the public from the dangers involved in the work of hazardous waste employees. Significantly, the OSHA standard in question, governing hazardous waste, was promulgated at the direction of Congress as part of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. § 9601 *et seq.*, so as to establish standards solely for the "health and safety of employees." SARA, Pub. L. No. 99-499, Title I, § 126(a), 100 Stat. 1690 (1986) [as amended Pub. L. No. 100-202, § 101(f), Title II, 101 Stat. 1329-198 (1987)]. OSHA's hazardous waste standard is limited by its terms to worker protection issues (*e.g.*, standards for site analysis, training, medical surveillance, protective equipment, engineering controls, maximum exposure limits, informational and new technology programs, handling of hazardous wastes, decontamination procedures, emergency responses, minimum illumination of worksite, monitoring of employee exposure levels and sanitation at temporary worksites). 29 C.F.R. § 1910.120 (1989). *See also* 54 Fed. Reg. 9294, 9315 (March 5, 1989). Indeed, OSHA expressly denied broad preemptive intent in

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[2](...continued)
to provide safe workplace); *P & Z Co. v. District of Columbia*, 408 A.2d 1249 (D.C. App. 1979) (OSH Act does not preempt District of Columbia employee injury reporting requirements); *LePore v. National Tool and Mfg. Co*, 224 N.J. Super. 463, 540 A.2d 1296, 1306 (App. Div. 1988), *aff'd*, 115 N.J. 226, 557 A.2d 1371 (per curiam), *cert. denied*, 493 U.S. 954 (1989)(Common law tort claim for wrongful discharge for reporting unsafe workplace conditions not preempted by OSH Act). The courts have also ruled that section 18 of the OSH Act does not preempt state criminal laws. *People v. Chicago Magnet Wire*, 126 Ill.2d 356, 534 N.E.2d 962 (1989), *cert. denied, sub nom. Asta v. Illinois*, 493 U.S. 809 (1989); *People v. Pymm*, 76 N.Y.2d 511, 561 N.Y.S.2d 687 (1990), *cert. denied, sub nom Pymm v. N.Y.*, 111 S. Ct. 958 (1991); *People v. Hegedus*, 432 Mich. 598, 443 N.W.2d 127 (1989); *State ex rel. Cornellier v. Black*, 144 Wis. 2d 745, 755, 425 N.W.2d 21 (1988). *But see Sabine Consol., Inc. v. State*, 756 S.W.2d 865 (Tex. Crim. App. 1988).

promulgating the hazardous waste standard. 54 Fed. Reg. at 9315.[3]

Thus, the OSH Act addresses only occupational safety and health issues. There is nothing in the statute which supports the Seventh Circuit's conclusion that a state law which protects the public welfare and the environment is preempted if it also has the effect of regulating occupational health and safety in the workplace. Section 18 of the OSH Act and OSHA's hazardous waste standard are silent as to their preemptive effect on state laws, such as the Illinois Operators and Laborers Acts, which have the dual purpose of protecting workers and the public welfare. Indeed, the Seventh Circuit acknowledged that the language of section 18 "does not indicate whether a state law or regulation that purports to serve a dual purpose is preempted." 918 F.2d at 677. As this Court has repeatedly stated, "[m]ere silence...cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority." *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. at 2483 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230).

To be sure, section 18(b) of the OSH Act does provide that where a federal standard is already in effect, a state may submit its own plan for the development and enforcement of workplace health and safety to the Secretary of Labor for approval. However, contrary to the Seventh Circuit's conclusion, this provision does not mean that a state must first obtain federal approval before its seeks to enforce all regulations which have *some* effect on worker safety and health. Section 18(b) relates only to the development and enforcement of occupational safety and health standards, and does not speak to state enforcement of licensing laws which have, as a broader purpose, the protection of the environment and the public welfare.

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[3] *See* 54 Fed. Reg. at 9315 (stating that OSHA sought to "refrain from limiting state policy options by developing a rule that permits flexibility on the part of the States...").

Moreover, the legislative history surrounding OSHA's promulgation of the hazardous waste standard fails to support the Seventh Circuit's conclusion. As noted previously, under SARA, OSHA was directed to promulgate the hazardous waste standard. There is no evidence in the legislative history of SARA that Congress intended to preempt state or local laws which have the dual purpose of protecting the public welfare and the environment, and worker safety. Congress was solely concerned with protecting employees engaged in hazardous waste operation. *SARA* § 126, 100 Stat. 1690 (1986). Significantly, the legislative history of SARA indicates that Congress, in general, recognized that states have a vital interest in state environmental guidelines. Indeed, in SARA, Congress took a number of steps to facilitate public and state participation in the problem of hazardous waste site cleanup.[4]

In support of its conclusion finding preemption, the Seventh Circuit nevertheless noted that:

> The original Senate version of what is now section 18 would have permitted states without having to obtain approval of a state plan, to impose during a transitional period stricter requirements than those established by OSHA. But that provision was eliminated from the final draft of the bill.

918 F.2d at 677.

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[4] For example, Congress added a new section 117 to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, added by SARA § 117, 100 Stat. 1654, which requires the Environmental Protection Agency to make early disclosure of its proposed remedial action plans, to solicit public input and to explain changes in response action. In addition, Congress gave the states a major role in the remedy selection process under section 121 of CERCLA. CERCLA § 121(f), 42 U.S.C. § 9621(f), added by SARA § 121, 100 Stat. 1672.

However, the mere elimination of a provision which would have permitted states to impose stricter occupational protection requirements than those imposed by OSHA, without having to obtain OSHA's approval of a state plan during a transitional period to review the state plan, can hardly denote a "clear and manifest" purpose to preempt state laws which have the broader goal of protecting the environment and the public welfare.[5] Thus, contrary to the conclusion of the Seventh Circuit, there is nothing in the legislative history to establish that Congress intended to preempt states from enforcing laws which have, as a dual purpose, the protection of the environment and the public welfare and worker safety in the area of hazardous waste site cleanup.

The Seventh Circuit's conclusion is inconsistent with this Court's repeated declaration that preemption will be found only where there is a "clear and manifest *purpose*" to displace state law. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. at 715 (emphasis added). *See also Gregory v. Ashcroft*, 111 S. Ct. 2395, 2410 (1991). In contrast to this standard, the Seventh Circuit considered only whether the state law "constitutes, in a direct, clear and substantial way, regulation of worker health and safety." 918 F.2d at 679. Under such an approach, state laws intended to protect public safety or the environment will be stricken, despite the fact that Congress did not intend to preempt such laws, simply because they also touch upon worker health and safety.

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[5] As the Seventh Circuit recognized, "[d]espite the deletion of this provision...section 18 does not evidence a congressional intent to achieve uniformity in worker health and safety regulation: if uniformity of standards were a principal goal of the Act, state plans certainly would not be an ideal mechanism to achieve that purpose." 918 F.2d at 677 (citation omitted). If uniformity was not Congress' concern in enacting section 18, Congress would not have intended that state regulations, which may impose stricter work requirements so as to protect the public welfare, be expressly preempted.

The Seventh Circuit's focus on the "actual effect" on employer-employee obligations, 918 F.2d at 679, and its reliance on *English v. General Electric Co.*, 496 U.S. 72 (1990) and *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. at 190, is misplaced. Both of those cases involved construction of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, which contains a broad preemption clause and expressly vested the federal government with exclusive authority over the regulation of nuclear safety. Determining whether the state law has an "actual effect" on nuclear safety was appropriate in those cases because the field of nuclear safety is exclusively regulated by the federal government and a broad preemption provision is involved. But this "actual effect" analysis is simply not appropriate when Congress, as here, did not intend to occupy entirely a given field or displace state regulation so long as the state laws do not conflict with federal law. *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. at 2476; *California Coastal Com'n v. Granite Rock Co.*, 480 U.S. 572 (1987). A consideration of whether Illinois' hazardous waste licensing requirements have a substantial effect on the federal regulatory scheme is more appropriate in the context of implied preemption where the issue is whether the state and federal laws actually conflict.

Finally, the Seventh Circuit's decision conflicts with the well reasoned decisions of three other circuits which have addressed the same issue. *Associated Indus. of Mass. v. Snow*, 898 F.2d 274 (1st Cir. 1990); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir. 1988); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), *cert. denied*, 492 U.S. 920 (1989); *Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987). In *Associated Indus. of Mass. v. Snow*, the First Circuit held that Massachusetts regulations establishing a system for training, licensure and certification of asbestos abatement workers had the effect of protecting the public and therefore were not expressly preempted by the OSH

Act. 898 F.2d at 281. In *Environmental Encapsulating Corp. v. City of New York*, the Second Circuit held that to the extent municipal regulations imposing training and certification requirements on asbestos abatement workers have a "legitimate and substantial purpose" apart from promotion of occupational health and safety, there is no preemption by the OSH Act. 855 F.2d at 57. In *New Jersey State Chamber of Commerce v. Hughey* and *Manufacturers Association of Tri-County v. Knepper*, the Third Circuit upheld parts of New Jersey's and Pennsylvania's community and worker right to know laws which had the promotion of environmental safety as their primary purpose. These three decisions recognize the interest of the states in retaining their historic police powers to protect the public welfare and the environment.

Thus, neither the language nor the legislative history of the OSH Act, SARA or OSHA's hazardous waste standard expressly preempts Illinois' hazardous waste licensing laws. In the face of the presumption that state laws regulating environmental safety matters can co-exist with federal law, *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. at 716, the Seventh Circuit's decision unduly restricts states from exercising their traditional police powers.

B. The OSH Act Does Not Impliedly Preempt State Licensing Laws Which Are Consistent With OSHA Standards And Which Advance OSHA's Goals

Where Congress has not expressly displaced state regulation in a specific area, a state will be impliedly preempted from such regulation only if Congress has occupied a field with "a scheme of federal regulation so persuasive as to make reasonable the inference that Congress left no room for the states to supplement it.'" *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. at 2481 (*quoting Rice v. Sante Fe Elevator Corp.*, 331 U.S.

at 230); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. at 204. Moreover, the state law is preempted only to the extent that it actually conflicts with federal law. *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. at 2482; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

> A conflict will be found "where compliance with both federal and state regulations is a physical impossibility or where the state 'law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.'"

Ray v. Atlantic Richfield Co., 435 U.S. at 158 (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Applying these standards, Illinois' hazardous waste licensing requirements are not impliedly preempted.[6] They neither conflict with OSHA's hazardous waste standard nor frustrate its regulatory goals and purpose. Illinois' regulations merely impose additional requirements on certain hazardous waste occupations in order to address potential environmental hazards and public health concerns. Indeed, given the fact that SARA encourages regulatory partnership between federal, state and local governments in the area of hazardous waste site clean up, *see* n. 4 *supra*, these state regulations further the goals of the OSHA hazardous waste standard.

OSHA standards and regulations have co-existed with state or local laws regulating trades or professions involving the public welfare since the enactment of the OSH Act in 1970. For example, although the OSH Act regulates occupational

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[6] The Seventh Circuit did not explicitly address the question of implied preemption. However, the Seventh Circuit concluded that Illinois' hazardous waste licensing requirement "could result in duplication and unwarranted costs to workers and employers." 918 F.2d at 679.

safety and health in plumbing and electrical work, *see* 29 C.F.R. § 1910.301 Subpart S, OSHA has never sought to preempt local licensing regulations involving these professions.

Neither SARA, the OSH Act nor OSHA's hazardous waste standard implies preemption of state licensing laws, such as those challenged here, which have the dual purpose of protecting the public welfare and protecting worker safety. To the contrary, no federal law seeks to establish licensing requirements for hazardous waste site workers in order to protect the environment and the public welfare. Federal law plainly does not occupy the field of hazardous waste site regulation and the OSH Act and OSHA's hazardous waste standard do not address the public health risks or potential injury to the environment which may result from unqualified and inexperienced hazardous waste site workers.

Moreover, there is no actual conflict between Illinois' hazardous waste licensing requirements and federal law.[7] Compliance with Illinois' laws and OSHA's hazardous waste standard is not a "physical impossibility." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. at 142-143. Although the Illinois' requirements might impose some additional costs on employers, one of the uncontroverted goals of these requirements is to protect the public welfare and the environment. Neither the OSH Act nor OSHA's hazardous waste standard forbids duplicative state requirements which have, as their goal, protection of the public safety. There is no evidence in this case that compliance with Illinois' hazardous waste licensing requirements actually conflicts with the OSH Act or OSHA's hazardous waste standard.

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[7] There is no basis for the Seventh Circuit's statement that Illinois' hazardous waste training requirements "might even conflict with OSHA's training requirements." 918 F.2d at 679. OSHA requires participation in an approved training course for 40 hours and Illinois requires at least 4,000 hours of work experience with crane and hoist equipment.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

Dated: New York, New York
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Respectfully submitted,

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